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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1247

RICHARD A. PERKINS, *Petitioner*,

v.

SCREEN EXTRAS GUILD, INC., a corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court

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OCTOBER TERM, 1975

No. .....

RICHARD A. PERKINS, *Petitioner*,

v.

SCREEN EXTRAS GUILD, INC., a corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Richard A. Perkins, petitioner herein, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on November 28, 1975.

OPINION BELOW

At this writing the opinion of the Court of Appeals has not yet been officially reported.* It has been reported at 90 LRRM (Labor Relations Reference Manual) 3272, a cur-

* Addendum: Citation is 526 F. 2d 67.

rent labor law reporting service of the Bureau of National Affairs, Inc. The opinion is reprinted in the appendix hereto, App. 2, *infra*. It deals with two consolidated appeals numbered 74-1355 and 74-2034 in the records of the Court of Appeals, taken from judgments rendered in two factually related but separate actions that have been referred to as the First and Second Disciplinary Cases. This petition for writ of certiorari, however, is concerned only with the judgment of the Court of Appeals rendered in its appeal numbered 74-2034, the Second Disciplinary Case.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1975. Rehearing was denied by an order dated December 30, 1975, and filed January 5, 1976: App. 1, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1234(1).

QUESTION PRESENTED

The question presented arises in the following context: The Labor-Management Reporting and Disclosure Act of 1959, in provisions known as the "Bill of Rights of Members of Labor Organizations," assures union members of the right of free speech. Labor organizations are forbidden to discipline any of their members for exercising that right, and provision is made for enforcement by civil action for such relief, including injunctions, as may be appropriate. In *Hall* v. *Cole*, 412 U.S. 1, this Court held that litigation which protected a union member against expulsion from membership for utterances in a trade union controversy necessarily rendered a substantial service to the membership of the union, so that the cost of the plaintiff's legal representation was payable out of the union treasury. The question presented in this case is:

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As punishment for utterances in a trade union controversy, is a labor organization privileged to discipline a union member by removing him from elected union office, so that legal services which protect him against such discipline render *no* substantial service to the membership and it is proper on that ground to deny compensation for his legal representation?

STATUTORY PROVISIONS INVOLVED

Title 29 U.S. Code:

§411(a) (2): *Freedom of Speech* . . . Every member of any labor organization shall have the right . . . to express any views, arguments, or opinions . . .: *Provided*, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. [§101(a) (2), Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 622.]

§529: *Prohibition on certain discipline by labor organization:* It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter [11 of Title 29.] The provisions of section 412 of this title shall be applicable in the enforcement of this section. [§609, Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541.]

§412: *Civil action for infringement of rights . . .:* Any person whose rights secured by the provisions of this subchapter [Title 29, §§411-415] have been infringed by any violation of this subchapter may bring a civil action

in a district court of the United States for such relief (including injunctions) as may be appropriate . . . [§102, Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 523.]

STATEMENT OF THE CASE

Ed Kerr, a member of the Screen Extras Guild, Inc., a labor organization, and a member of its board of directors, gave a statement to a motion picture industry trade publication concerning a Department of Labor finding of violations of law in a union election at which he had been an unsuccessful candidate for president. After taking office the successful candidate charged him with a union offense for having made the statement to the publication. The charges were investigated and noticed for hearing by another union functionary, whose tenure in office was being challenged by a referendum which Kerr had brought about by means of other litigation (*Kerr* v. *Shanks*, et al., 9 Cir., 466 F. 2d 1271.)

Kerr instituted an action for injunctive relief and damages (the First Disciplinary Case.) On return to an order to show cause why a preliminary injunction should not issue union counsel assured the District Court that his client would desist from interference with Kerr's union membership rights. The First Disciplinary Case was thereupon dismissed on the ground of mootness and Kerr's application for an allowance for his counsel fees was denied. Those orders were reversed: *Kerr* v. *Screen Extras Guild*, 9 Cir., 466 F. 2d 1267, cert. den. 412 U.S. 918.

While Kerr's appeal from dismissal of the First Disciplinary Case was pending, the governing officials of the Screen Extras Guild instituted another proceeding against him, based on the same charges upon which the previous proceeding had been founded. The only difference was that the latest notice of hearing specified removal from

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the Guild's board of directors as the object of the renewed disciplinary proceeding.

The then pending appeal having deprived the District Court of jurisdiction to furnish him protection in the First Disciplinary Case, Kerr instituted a second Federal court action, the Second Disciplinary Case. That action was prosecuted by petitioner herein as Kerr's counsel. In consequence of Kerr's application for provisional injunctive relief in that case the Screen Extras Guild from time to time continued and ultimately abandoned the disciplinary proceeding against him, so that he was permitted to serve out his elected term of office as a director of the Guild, and his prayer for injunctive relief became moot.

At trial on the merits judgment was rendered against Kerr and his application for an allowance of counsel fees was denied. While an appeal from that judgment was pending, this Court decided *Hall* v. *Cole*, 412 U.S. 1. Because of that decision, counsel in the Second Disciplinary Case stipulated for reversal of the previous judgment therein, and the Court of Appeals vacated that judgment and remanded the case to the District Court with directions for further proceedings not inconsistent with this Court's decision in *Hall* v. *Cole*.

After the remand, petitioner was granted leave to withdraw as Kerr's counsel and present his own application for an allowance of counsel fees (following the procedure adopted in *Bakery Workers, etc.* v. *Ratner*, D.C. Cir., 335 F. 2d 691.) But notwithstanding the terms of the remand, the District Court reaffirmed its previous decision and again denied any allowance for counsel fees. The Court of Appeals then affirmed by the judgment to which this petition is directed. Rehearing was denied.

The facts recited by the Court of Appeals manifest its recognition that petitioner's services in the Second Dis-

ciplinary Case protected Kerr's tenure in office as a member of the board of directors of the Guild, thus: "Kerr again filed suit against the Guild and sought a preliminary injunction. Upon assurances by the Guild that no action would be taken on the disciplinary proceeding, the court granted several continuances. By the time the case came to trial, Kerr's term of office had expired." And the Court of Appeals "recognized that abandonment of threatened disciplinary proceedings may justify the award of attorney's fees," citing *Kerr* v. *Screen Extras Guild, Inc.*, 9 Cir., 466 F. 2d 1267, cert. den. 412 U.S. 918. Yet the Court of Appeals affirmed the District Court's denial of any compensation to petitioner. As we shall show, the decisions of both courts on the point went on the ground that protection of a union officer-member against removal from office for utterances in a trade union controversy does not confer a substantial benefit on the membership of the union.*

As stated in the opinion of the Court of Appeals, "The District Court held that proceedings to remove Kerr as

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* The District Court mentioned other possible reasons for denial of petitioner's application for attorney's fees, but the Court of Appeals did not adopt them, and they plainly lack merit. For one thing, the District Court adverted to compensation awarded petitioner in other cases for services rendered therein, but *not* including any services rendered in the Second Disciplinary Case. And although the District Court asserted (mistakenly, in our view,) that the union treasury had been "depleted" by payment of fees to its own counsel and to petitioner, it did not find that anything paid or being asked for "might impair the union's ability to operate effectively" within the doctrine of *Hall* v. *Cole*, 412 U.S. 1, 15; moreover, the District Court failed to take into account the fact that petitioner's services would bring about restitution to the Guild of unauthorized payments of official salary and attorney fees; see *Kerr* v. *Shanks*, 9 Cir., 466 F. 2d 1271, 1276-1277. The circumstance that judgment went against Kerr on the merits after his prayer for injunctive relief became moot did not render petitioner's services non-compensable. As the Court of Appeals states, even after judgment Kerr's claim was settled; moreover, the rendition of useful interim services was compensable without regard to the ultimate outcome of the litigation: *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 396.

an unpaid director were not actionable under 29 U.S.C. §412 where instituted without malice and without affecting his membership status . . .'' The appellate court went on to say:

> ''. . . The primary question . . . is whether the district court abused its discretion in concluding that prosecution of the Second Disciplinary Case conferred no substantial benefit upon the Guild's members.''
>
> ''. . . we find that prosecution of the Second Disciplinary Case did not confer a substantial benefit upon the Guild's members. The primary benefit had already been conferred upon the members of the union by the First Disciplinary Case. Any benefit conferred by the Second Disciplinary Case was at best, as the district court characterized it, 'tenuous.' Because the requirements of *Hall* v. *Cole* for the award of attorney's fees have not been met, we affirm the decision of the district court in No. 74-2034 . . .''

But as the factual recital of the Court of Appeals shows, the prosecution of the First Disciplinary Case did *not* protect Kerr in the exercise of his right of free speech as against reprisal in the form of removal from union office. ''After Kerr had filed his notice of appeal in the First Disciplinary Case, he received another notice of hearing on the same charges but contemplating only his removal from the board.''

Thus, despite union counsel's assurance to the District Court in the First Disciplinary Case ''that the Guild would take no further action to interfere with Kerr's union membership rights,'' as soon as the appeal had removed that case from the jurisdiction of the District Court the Guild renewed its offensive against him, this time by a proceeding looking toward his removal from its board of directors. The First Disciplinary Case did not protect him against

that; it took the Second Disciplinary Case to do so. The Court of Appeals' finding of "no substantial benefit" to the membership from the Second Disciplinary Case means that in the view of that court the membership of a union is not benefited by litigation which protects a union officer-member against removal from elected office in reprisal for his utterances in a trade union controversy.

REASONS FOR GRANTING THE WRIT

1. In its opinion the Court of Appeals conceded formal recognition to this Court's decision in *Hall* v. *Cole*, 412 U.S. 1, to the extent of citing it and restating the two grounds (bad faith and common benefit) which this Court there approved for the allowance of counsel fees in cases brought under 29 U.S.C. §412 to enforce the "Bill of Rights of Members of Labor Organizations" (29 U.S.C. §411.) But the actual decision of the Court of Appeals is in conflict with this Court's decision in *Hall* v. *Cole*.

In *Hall* v. *Cole* this Court had to consider whether attorney fees could be allowed a successful plaintiff in an action under 29 U.S.C. §412. In that case it appeared that the plaintiff had been expelled from membership in his union for alleged "malicious vilification" of the union leadership. He instituted litigation which brought about his restoration to membership. This Court approved the allowance of counsel fees in such actions on two separate and independent grounds, *viz.*: common benefit to the membership and bad faith. Referring to the common benefit standard, this Court said:

> "there can be no doubt that, by vindicating his own right of free speech guaranteed by §101(a)(2) of Title I of the IMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disci-

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> plined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispells the 'chill' cast upon the rights of others." (412 U.S. at 8.)

The Second Disciplinary Case, in which the plaintiff union member was represented by petitioner herein as his attorney, protected the plaintiff against removal from his elected office as a member of the union's board of directors for his exercise of his right of free speech. According to the doctrine of this Court's decision in *Hall* v. *Cole*, by vindicating his own right of free speech the plaintiff in the Second Disciplinary Case, through petitioner as his attorney, necessarily rendered a substantial service to the union as an institution and to all of its members. But the Court of Appeals held to the contrary, "that prosecution of the Second Disciplinary Case did not confer a substantial benefit upon the Guild's members." We submit that the conflict with this Court's decision is clear.

A valid distinction cannot be drawn between *Hall* v. *Cole* and the instant case on the ground that one case involved expulsion from union membership and the other removal from elected union office. Removal from office in reprisal for the exercise of the right of free speech is surely "discipline" as the term was used, both in this Court's opinion in *Hall* v. *Cole*, 412 U.S. 1, at 8, and in the applicable statutory provision, 29 U.S.C. §529, which forbids any action by a labor organization "to fine, suspend, expel, or *otherwise discipline* any of its members for exercising any right to which he is entitled under the provisions of this chapter [11 of Title 29]." (Emphasis supplied.) Even the Court of Appeals which decided the instant case earlier recognized that removal from union office for the exercise of free speech rights constitutes forbidden "discipline" under 29 U.S.C. §529: *Grand Lodge of I.A.M.* v. *King*, 9 Cir., 335 F. 2d 340, 345, cert. den. 379 U.S. 920.

In *Hall* v. *Cole* this Court cited with evident approval several lower court decisions allowing counsel fees in actions under 29 U.S.C. §412. Most of them involved discipline in the form of removal or suspension from union office, and in all of those cases it was held that protection of the union officer-member against such discipline conferred a benefit on the membership that was compensable out of the union treasury.

In *Yablonski* v. *United Mine Workers*, D.C. Cir., 466 F. 2d 424, cert. den. 412 U.S. 918, cited by this Court, one of the cases for which counsel fees were awarded was the "Reinstatement Case," which had to do with Yablonski's removal from his position as acting director of Labor's Non-Partisan League. It was argued on behalf of the union management that "the Yablonski lawsuits did not benefit anyone except Yablonski." (430.) But the appellate court there said:

> "Our examination of the record before us leaves us in no doubt that the institution of these lawsuits proved to be significantly beneficial to UMW and its members, not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs. . . . The Reinstatement Case demonstrated that the courts would be quick to strike down any heavy-handed retaliation against a union member who dared to challenge the incumbent leadership. . . . We do not think the benefits issue needs the belaboring of detailed exposition. Surely few would claim that the results of these litigations have not made the UMW a more democratic union or membership in it a more valuable and dignified status. Certainly no member of Congress who voted for LMRDA would fail to recognize that in this instance the Act worked just the way it was intended to work, i.e., advancing union democracy by opening up the courts to one di-

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rectly aggrieved member for the benefit of all." (466 F. 2d at 431.)

Salzhandler v. *Caputo*, 2 Cir., 315 F. 2d 445, 451, also cited by this Court, was a case in which a union officer-member had been subjected to discipline which restricted his union activities and "stripped him of his office" for having accused the leadership of improper financial activities. The appellate court recognized that "Freedom of expression would be stifled" by such discipline, and directed the lower court to grant appropriate relief. On remand the district court rendered a decision *sub. nom. Sands* v. *Abelli*, 290 F. Supp. 677, also cited by this Court, awarding counsel fees to the plaintiff and stating that "The efforts of this plaintiff unquestionably resulted in a benefit to his union." (290 F. Supp. at 686.)

And in *Cefalo* v. *District 50, UMW*, 311 F. Supp. 946, also cited by this Court, attorney fees were awarded to union officers who had been demoted or transferred in retaliation for their support of a slate of candidates running against the incumbent union administration. The court there cited "the indirect benefit to the Union and its members as a whole" from the reinstatement as a reason for the award of attorney fees (311 F. Supp. at 955.)

From what has been said we suggest that it is clear that nothing in this Court's decision in *Hall v. Cole* and nothing properly inferable therefrom supports the notion that removal from union office is anything other than the kind of discipline to which this Court referred when it said: "When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened." So that, in this Court's words, "there can be no doubt that, by vindicating his own right of free speech guaranteed by §101 (a)(2) of Title I of the LMRDA, [plaintiff union member] neces-

sarily rendered a substantial service to his union as an institution and to all of its members." (412 U.S. at 8.)

As we have shown, the decision of the Court of Appeals in the instant case, affirming denial of an attorney fee allowance on the ground of no substantial benefit to the members of the union involved, is contrary to this Court's holding that essentially similar service "necessarily rendered a substantial service to the union as an institution and to all of its members." According to accepted standards, therefore, the writ of certiorari should issue to review the judgment of the Court of Appeals.

Review by certiorari is further supported by the principles announced by this Court in the analogous cases of *Mills* v. *Electric Auto-Lite Co.*, 395 U.S. 375, and *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400. In both of those cases the rendition of similar services was held not merely to authorize, but to require compensation in the absence of countervailing equitable considerations. And such review might well take into account the growing body of material showing increased public awareness of "The Effect of Legal Fees on the Adequacy of Representation," the topic of hearings by the Senate Judiciary Subcommittee on Representation of Citizen Interests, 93rd Cong., 1st Sess.

2. If, contrary to what has been said, it is believed that under this Court's decision in *Hall* v. *Cole* a question still remains open as to whether the membership of a union is substantially benefited by protecting a union officer-member against removal from elected office in reprisal for utterances in a trade union controversy, then there is at least a conflict between the decision of the Court of Appeals in the instant case and decisions of the Courts of Appeals of the District of Columbia and Second Circuits: *Yablonski* v. *United Mine Workers*, D.C. Cir., 466 F. 2d 424, cert. den. 412 U.S. 918; and *Salzhandler* v. *Caputo*, 2 Cir., 316 F. 2d 445, discussed above.

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District Courts in the Second and District of Columbia Circuits have followed the lead of their respective circuits. We referred above to *Sands* v. *Abelli* (D. N.Y.) 290 F. Supp. 677 and *Cefalo* v. *District 50, UMW* (D.D.C.) 311 F. Supp. 946, cited in this Court's opinion in *Hall* v. *Cole*. In addition, we invite attention to two other cases in the District of Columbia Circuit. In *Bakery etc. Workers* v. *Ratner*, D.C. Cir., 335 F. 2d 691, 695n., the appellate court approved an award of attorney fees for services rendered in *Alvino* v. *Bakery etc. Union* (D.D.C.) 46 LRRM 2812, in which the district court ordered reinstatement of four union officers who had been removed or suspended from office in reprisal for their support of a campaign to oust the union president. And in *Retail Clerks Union, Local 648*, v. *Retail Clerks Int'l Assn.* (D.D.C.) 299 F. Supp. 1012, the court ordered the reinstatement of two union vice-presidents who had been removed from office because they had been members of a slate of candidates opposing the incumbent administration. In awarding attorney fees the court said: "although the specific relief is the reinstatement of two individuals, the effect of such a ruling is to further the rights of free expression within the [international union], thereby benefiting the Union and its members as a whole." (299 F. Supp. at 1022.)

Thus, a number of decisions demonstrate that in the Second and District of Columbia Circuits it is settled doctrine that legal services for the protection of union officer-members against unlawful discipline confer on the membership substantial benefits which are compensable out of the union treasury. Accordingly, even if the decision of the Court of Appeals for the Ninth Circuit in the instant case is not thought to be in conflict with this Court's decision in *Hall* v. *Cole*, there is at least a conflict among circuits which calls for certiorari review.

3. The question presented is of importance in the administration of the Labor-Management Reporting and Disclosure Act, 1959, 29 U.S.C. §401, *et seq.*, and particularly the "Bill of Rights of Members of Labor Organizations," 29 U.S.C. §411. We have mentioned that a number of reported decisions involved the unlawful discipline of union officer-members in reprisal for utterances in trade union controversies. It is easy to understand why this should be so. The more articulate and active union members are more likely than others to attain union office, from which they may question and oppose an incumbent union administration more effectively (and more dangerously, from the administration point of view) than could be done from mere rank and file positions. Officer-members are thus more liable to unlawful discipline, and more in need of protection.

As the Court of Appeals for the Ninth Circuit earlier said in *Grand Lodge of I.A.M.* v. *King*, 335 F. 2d 340, 344, 345, cert. den. 379 U.S. 920, "to exclude officer-members from ["Bill of Rights"] coverage would deny protection to those best equipped to keep union government vigorously and effectively democratic;" "the members thus exposed to reprisal would be those whose uninhibited exercise of freedom of speech and assembly is most important to effective democracy in union government."

But "Bill of Rights" coverage is effectively denied union officer-members by the Court of Appeals decision in this case, which would impose on them the impossible burden of financing litigation to protect their tenure in office and would require them to match dollars with union treasuries controlled by their adversaries. As was said in *Gartner* v. *Soloner*, 3 Cir., 384 F. 2d 348, 355, cert. den. 390 U.S. 1040, denial of counsel fees expended by a plaintiff in defeating his union's effort to deprive him of his fundamental rights as a member would "tear up the bill of rights."

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The writ of certiorari should therefore issue to correct the present course of decision in the Ninth Circuit and bring it into harmony with the decision of this Court in *Hall* v. *Cole*, 412 U.S. 1, and with the cited decisions of the Courts of Appeals for the Second and District of Columbia Circuits.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. NEWELL,
Counsel for petitioner.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. PERKINS,

Appellant,

vs.

SCREEN EXTRAS GUILD, INC., a corporation,

Appellee.

FILED
JAN. 5, 1976
EMIL E. MELFI, JR.
CLERK
U. S. COURT OF APPEALS

No. 74-2034
ORDER

Before: BARNES and HUFSTEDLER, Circuit Judges, and SKOPIL,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

Dated: December 30, 1975

*The Honorable Otto R. Skopil, Jr., United States District Judge, for the District of Oregon, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ED KERR, *Plaintiff,* vs. SCREEN EXTRAS GUILD, INC., a corporation, *Defendant-Appellee,* RICHARD A. PERKINS, counsel for Plaintiff, *Appellant.*	No. 74-1355
ED KERR, *Plaintiff,* vs. SCREEN EXTRAS GUILD, INC., a corporation, H. O'NEIL SHANKS, and NORMAN STEVANS, *Defendants-Appellees,* RICHARD A. PERKINS, counsel for Plaintiff, *Appellant.*	No. 74-2034 OPINION

[November 28, 1975]

On Appeal from the United States District Court
for the Central District of California

Before: BARNES and HUFSTEDLER, Circuit Judges,
and SKOPIL,* District Judge

SKOPIL, District Judge:

Attorney Richard A. Perkins represented Ed Kerr, a union member, in four related actions brought against the Screen Extras Guild, Inc. and certain of its officers for activities prohibited by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§401

*The Honorable Otto R. Skopil, Jr., United States District Judge, for the District of Oregon, sitting by designation.

et seq. The first two actions were eventually resolved in favor of Kerr. *Kerr v. Shanks*, 466 F. 2d 1271 (9th Cir. 1972). On remand to the district court, Perkins was awarded attorney's fees of $20,000 for his efforts in the two cases.

This consolidated appeal involves the award of attorney's fees in the third and fourth actions brought on behalf of Kerr (herein denominated the First and Second Disciplinary Cases). Both actions arose from attempts by the Guild to discipline Kerr for having supplied information to the *Daily Variety*, a motion picture industry trade publication, that the Guild had been found in violation of the LMRDA. In No. 74-1355, Perkins claims that the award of only $6,000 in attorney's fees in the First Disclipinary Case constitutes an abuse of discretion. In No. 74-2034, Perkins appeals from the denial of attorney's fees in the Second Disciplinary Case.

No. 74-1355 (FIRST DISCIPLINARY CASE)

The First Disciplinary Case involved the Guild's attempt to discipline Kerr in his status as a union member. At the hearing on Kerr's motion for a preliminary injunction, counsel for the Guild assured the district court that the Guild would take no further action to interfere with Kerr's union membership rights. The court then ordered the action dismissed as moot, except for the issue of the award of litigation expenses to Kerr. Subsequently, the district court denied any award.

On appeal, however, we held that the action was not moot and further held that the LMRDA permits the recovery of litigation expenses, including reasonable attorney's fees, in suits brought under 29 U.S.C. §§ 412 and 529. *Kerr v. Screen Extras Guild, Inc.*, 466 F.2d 1267 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973). The case was remanded to the district court, which was ordered to exer-

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cise its discretion to determine whether Kerr was entitled to recover his litigation expenses. After remand, Perkins was granted leave to withdraw as Kerr's counsel and prosecute his own application for the allowance of attorney's fees.

In support of his claim for attorney's fees, Perkins submitted the following evidence: a detailed list of services performed and results achieved, a conservative estimate that he had spent 125 hours on the case, a summary of his education and experience, information on attorney's fees paid by the Guild to its attorneys, expert testimony that a fee of $12,000 to $15,000 would be reasonable, and his own opinion that his services were worth $12,500. The Guild argued that a fee of $50 per hour is reasonable in such cases. Additionally, the Guild pointed out that Perkins had already received $20,000 in attorney's fees in prior related cases and that the treasury of the Guild, a relatively small union, had already been depleted by payments made to Perkins and the Guild's own attorneys.

After an evidentiary hearing on the issue of attorney's fees, the district judge issued an order awarding fees in the amount of $6,000. The court gave the following explanation for its decision: "The court believes that amount to be reasonable under all the circumstances of this case." *Kerr v. Screen Extras Guild, Inc.*, Civil No. 69-1954-HP (C.D. Cal., Nov. 7, 1973).

The amount of attorney's fees to be awarded is, of course, within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Twentieth Century Fox Film Corporation v. Goldwyn*, 328 F.2d 190, 221 (9th Cir. 1964). Nonetheless, review under any standard is difficult because of the trial court's failure to explain its decision. No correlation between the evidence presented and the amount awarded is apparent from the record.

In a case presenting a similar situation, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the Fifth Circuit found it necessary to vacate the award of attorney's fees and remand for reconsideration in light of the following guidelines: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. These guidelines are consistent with those recommended by the Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 2-106.

We adopt these guidelines as appropriate factors to be considered in the balancing process required in a determination of reasonable attorney's fees. The failure to consider such factors constitutes an abuse of discretion.

Because the record before us is devoid of information as to the factors considered by the district court in its determination, a meaningful review is impossible. Therefore, the case is remanded for the limited purpose of making findings of fact and conclusions of law. The matter can be covered by an opinion containing a recital of the facts and the guidelines considered in determining attorney's fees. This opinion should be entered after vacating the old judgment. We do not intend to express any opinion herein that the amount of fees previously awarded should or should not be changed.

No. 74-2034 (SECOND DISCIPLINARY CASE)

The Second Disciplinary Case involved the Guild's attempt to discipline Kerr in his status as a member of the Guild's board of directors. After Kerr had filed his notice of appeal in the First Disciplinary Case, he received another notice of hearing on the same charges but contemplating only his removal from the board. Kerr again filed suit against the Guild and sought a preliminary injunction. Upon assurance by the Guild that no action would be taken on the disciplinary proceeding, the court granted several continuances. By the time the case came to trial, Kerr's term of office had expired.

The district court held that proceedings to remove Kerr as an unpaid director were not actionable under 29 U.S.C. § 412 where instituted without malice and without affecting his membership status. Finding that Kerr had rendered no benefit to the Guild or to its members by filing the Second Disciplinary Case, the court further denied any award of attorney's fees. *Kerr v. Screen Extras Guild, Inc.*, Civil No. 70-259-LTL (C.D. Cal., Jan. 12, 1972).

Kerr appealed. While the appeal was pending, however, the United States Supreme Court handed down its decision in *Hall v. Cole*, 412 U.S. 1 (1973), holding that attorney's fees may be awarded in cases brought under the LMRDA, 29 U.S.C. § 412. In light of that decision, Kerr and the Guild entered into a stipulation which led to the vacation of the district court's judgment and remand of the cause for "further proceedings not inconsistent with *Hall v. Cole*". *Kerr v. Screen Extras Guild, Inc.*, No. 72-1861 (9th Cir., July 10, 1973). After remand, Perkins was granted leave to withdraw as Kerr's counsel and prosecute his own application for the allowance of attorney's fees. (Kerr and the Guild eventually entered into a settlement as to Kerr's claims.)

Having reconsidered its decision in light of *Hall v. Cole*, the district court reaffirmed its denial of attorney's fees. The court again found no evidence of malice, no violation of Kerr's rights as a union member, and no benefit to the union from the bringing of the Second Disciplinary Case. *Kerr v. Screen Extras Guild, Inc.*, Civil No. 70-259-LTL (C.D. Cal., March 25, 1974). Perkins appeals from the denial of attorney's fees.

The Supreme Court has established two separate criteria for the awarding of attorney's fees to a "successful" plaintiff in an action brought under 29 U.S.C. § 412. The first is bad faith on the part of the defendants; the second, conferring a substantial benefit on the other members of the union. *Hall v. Cole*, 412 U.S. 1 (1973). The court below expressly found no evidence of bad faith. This finding is not clearly erroneous. The primary question, therefore, is whether the district court abused its discretion in concluding that prosecution of the Second Disciplinary Case conferred no substantial benefit upon the Guild's members.

Initially, this case presents some problems in determining whether Kerr, the plaintiff, may be characterized as "successful". The district court found against Kerr in all respects, and Kerr has not prosecuted any appeal from that decision. Perkins argues that the Second Disciplinary Case was in fact successful in that the Guild abandoned the disciplinary proceedings after suit was brought. We have previously recognized that abandonment of threatened disciplinary proceedings may justify the award of attorney's fees. *Kerr v. Screen Extras Guild, Inc.*, 466 F.2d 1267, 1271 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973). See *Yablonski v. United Mine Workers of America*, 466 F.2d 424, 431 (D.C. Cir. 1972), cert. denied, 412 U.S. 918 (1973).

We need not determine whether Kerr is a successful plaintiff, however, because we find that prosecution of the

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Second Disciplinary Case did not confer a substantial benefit upon the Guild's members. The primary benefit had already been conferred upon the members of the union by the First Disciplinary Case. Any benefit conferred by the Second Disciplinary Case was at best, as the district court characterized it, "tenuous". Because the requirements of *Hall v. Cole* for the award of attorney's fees have not been met, we affirm the decision of the district court in No. 74-2034. We express no opinion on the merits of Kerr's claim in the Second Disciplinary Case.

Kerr v. Screen Extras Guild, Inc., No. 74-1355, is remanded.

Kerr v. Screen Extras Guild, Inc., No. 74-2034, is affirmed.

In No. 74-1355 it is requested that a new judgment be entered within ninety days. Should an appeal be taken, the parties should stipulate for an expedited briefing schedule and for inclusion of both the old and new records in the record on appeal.

If an appeal is taken, the Clerk of this Court is requested to set the appeal before this same panel.

IN THE

Supreme Court of the United States

October Term, 1976
No. 75-1947

RICHARD A. BERRY,

Petitioner,

v.

SCREEN EXTRAS GUILD, INC., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1247

RICHARD A. PERKINS,

Petitioner,

vs.

SCREEN EXTRAS GUILD, INC., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement of the Case.

In order for the Court to fully understand the background of this case, it is necessary for Respondent to review the history of the litigation involving Petitioner.

This Petition is another step in a long and complex series of litigation that has been in effect since 1968 and has involved four District Court Judges, three appeals to the Court of Appeals and two Petitions for Certiorari to this Court. All the litigation is completed except for the single issue of whether adequate attorney's fees were awarded to Petitioner.

A brief history of this litigation involving the Plaintiff, Ed Kerr and the Screen Extras Guild, H. O'Neil Shanks and two other officers of the Guild is necessary in order to properly present the issue of adequacy of attorney's fees to Petitioner.

Ed Kerr (Petitioner's former client, and Plaintiff in all the cases) was involved in three separate actions in the District Courts, as well as a prior State action involving claims by Kerr as against the Guild and three officers of the Guild.

One case involved an appeal before the Court of Appeals (466 F.2d 1271 (9th Cir. 1972)) on a claim that the three officers had received salaries and expenses from the Guild under an agreement which had not been presented to the membership for a referendum vote as required by the Constitution and Bylaws of the Guild and therefore, the monies were received in violation of Title V of the Labor Management Reporting and Disclosure Act (29 U.S.C. 501). The District Court had originally denied relief to Kerr as well as denying attorney's fees to Petitioner. The Court of Appeals reversed the District Court and remanded the case to the District Court for trial on the basis that the amounts of salary and expenses were to be returned to the Guild and that a portion of the attorney's fees that was expended by the Guild to its attorneys for representing the individual Defendants was to be charged to the individual Defendants and that Petitioner was to be awarded attorney's fees. The case was remanded to the District Court and Petitioner moved for withdrawal as attorney of record for Kerr. Petitioner petitioned for attorney's fees and after a hearing and a trial, was awarded $20,000.00 by the District Court. The remaining issues were resolved after trial and Kerr's new attorney was awarded $2,500.00 by the District Court. A Judgment was entered as against the three officers regarding the return of salaries and expenses, as well as the amount of attorney's fees apportioned to them that were expended by the Guild in defending the case.

Regarding the Title V case (68-1352-FW), Petitioner received $20,000.00 as attorney's fees which has been paid by the Guild.

In Case No. 69-1954-HP (the First Disciplinary case), the issue involved a charge filed by a member of the Guild against Kerr, claiming that Kerr had caused to be published an article in the Daily Variety (an entertainment industry trade newspaper), a statement regarding the internal activities of the Guild. The Guild did not process the charges and based on representation by the Guild's attorney before the District Judge, the charges were not heard and Kerr was never required to appear before a trial board of the Guild. The District Court, based on this representation of Counsel, dismissed the Complaint on the basis that there were no further issues to be tried and that under Title I, Petitioner was not entitled to attorney's fees. An appeal was taken and the Court of Appeals (466 F.2d 1267 (9th Cir. 1972)), reversed the District Court and remanded the case for trial and held that Petitioner was entitled to attorney's fees and that Kerr was entitled to a trial regarding any damages. The case was remanded and Petitioner withdrew as attorney for Kerr. Petitioner petitioned the District Court for attorney's fees. The District Court granted Petitioner $6,000.00 attorney's fees. Petitioner appealed from this Judgment of the District Court (69-1954-HP) on the basis that the $6,000.00 was an inadequate amount to award as attorney's fees. It should be pointed out that following the decision of the Court of Appeals in 69-1954-HP, the Guild filed a Petition for Certiorari before the United States Supreme Court on the issue as to whether attorney's fees were allowable under Title I of the Act. While the Petition was pending before this Court, the case

of *Hall v. Cole*, 412 U.S. 1 (1973) was decided where this Court held that, under proper circumstances, attorney's fees could be awarded by a District Court in a Title I action.

The Court of Appeals for the Ninth Circuit in the First Disciplinary case, which was consolidated with the current case, remanded the case to the Court for specific Findings of Fact as to why the District Court found that $6,000.00 constituted reasonable attorney's fees.

In the third case referred to as 79-259-LTL (Second Disciplinary case) Kerr filed suit against the Guild and the same officers on the basis that a charge had been filed with the Guild based on the same article in the Daily Variety. This charge regarded Kerr's status as a member of the Board of Directors of the Guild. The prior case (69-1954-HP) was based on the charge concerning his membership in the Guild. Prior to the case coming to trial, the Guild's attorney represented to the Court that the charge would not be processed regarding Kerr's position as a member of the Board of Directors of the Guild. Such charges were never processed; Kerr did not have to appear before any trial board of the Guild; and he finished his full term of office as a member of the Board of Directors without any disturbance or interruption by the Guild or any of its officers. This issue was presented to the District Court who found that there was no violation of Title I and entered a Judgment of Dismissal of the Complaint and held that Petitioner was not entitled to attorney's fees.

Petitioner and Kerr appealed from the Judgment entered by the District Court. However, prior to any

briefs being filed, *Hall v. Cole* was decided by this Court.

The Guild agreed to a Stipulation that the Judgment of the District Court in 70-259-LTL could be reversed and vacated and remanded to the District Court. It was the position of the Guild that in view of *Hall v. Cole,* there was no point in having the appeal heard by the Court of Appeals with the expense involved in filing briefs and arguments and then to have the Court of Appeals remand to the District Court to review the case in light of the Supreme Court determination in *Hall v. Cole.* The Guild's position was that it was preferable to have the District Court reconsider the matter based on the decision of *Hall v. Cole,* and determine whether the District Court decision would remain the same in view of the resolution of the issue as to whether attorney's fees were allowable in a Title I action as was determined by this Court in *Hall v. Cole.*

Upon the Stipulation to Remand to the District Court, Petitioner withdrew as attorney of record for Kerr, and petitioned the District Court for attorney's fees. The Guild requested reconsideration on the basis that in view of *Hall v. Cole,* there was still no merit to Kerr's case; that the original Judgment of the District Court was correct which was determined following a trial and based on Findings of Fact and Conclusions of Law; that although the case was properly reconsidered in view of *Hall v. Cole,* the original Judgment should not be changed and the District Court should enter Judgment for the Guild, and to deny attorney's fees to the Petitioner.

The District Court upon reconsideration of its original Judgment, denied attorney's fees to Petitioner.

The Court of Appeals for the Ninth Circuit affirmed the District Court on the basis of the Findings of Fact of the District Court in exercising its discretion in concluding that the Second Disciplinary case which was prosecuted by Petitioner conferred no substantial benefit upon the Guild's members. In addition, the Court of Appeals stated that there were problems in determining whether Kerr may be characterized as "successful" or not. The District Court found against Kerr in all respects and Kerr had not prosecuted any appeal from that decision. The Court of Appeals further concluded that they do not have to determine whether Kerr was a "successful plaintiff" because the Court of Appeals found that prosecution of the Second Disciplinary case did not confer a substantial benefit upon the Guild's members. The Court of Appeals held that the primary benefit had already been conferred upon the members of the Union by the First Disciplinary case.

REASONS FOR DENYING THE WRIT.

1. The Petitioner urges that there is some necessity for this Court to determine whether *Hall v. Cole* draws a distinction under a Title I case as to whether the prosecution by the Union involves the rights of a member as a member, or the rights as a member to hold a Union office, and whether the substantial benefit test to membership also applies to a Union's action concerning the status of a Union member as a Union officer.

Petitioner in setting up this artificial issue alleges that there is some conflict between the Court of Appeals on this issue and clarification and a determinative decision is required by this Court.

The Court of Appeals did not draw any distinction nor did the District Court between Kerr's status as a member regarding a disciplinary procedure by the Union, or Kerr's status as a member of the Board of Directors regarding a disciplinary action by the Guild under Title I. The Court of Appeals upheld the District Court in its exercise of discretion in making a determination of fact that the prosecution by Kerr in the Second Disciplinary case did not render any substantial service or benefit to the membership of the Guild in view of the fact that the First Disciplinary case was determined and Petitioner had received an award of attorney's fees in the First Disciplinary case. The Court of Appeals followed the basic proposition that on a question of fact it is within the discretion of the District Court to make its determination as to whether on a factual matter, the prosecution of the Second Disciplinary case did or did not confer a substantial benefit upon the Guild's members.

Petitioner urges this Court to grant the Writ and emphasizes that there was a Stipulation for Order of Remand back to the District Court following the First Appeal in the case which somehow requires the granting of attorney's fees under *Hall v. Cole.*

In the first Judgment entered by the District Court, the Guild and Kerr through Petitioner entered into the following stipulation

> "The judgment of the District Court is vacated and the cause is remanded for further proceedings not inconsistent with *Hall vs. Cole,* .... U.S. .... (41 U.S. L.W. 4658, May 21, 1973)."

It was consistently the position of the Guild before the District Court that the reason for the Stipulation to Remand the case was to have the District Court review its previous Findings of Fact and Conclusions of Law and Memorandum of Decision in light of *Hall v. Cole,* in order to avoid the expense and time of filing briefs before the Court of Appeals and having the Court of Appeals possibly remand the case to have the District Court review its decision under *Hall v. Cole.* It was more practical and less costly to the parties, in view of *Hall v. Cole,* to remand by Stipulation and have the District Court review its original Judgment, Findings of Fact, and Conclusions of Law. Petitioner would make too much of this Stipulation and seems to argue that based on the Stipulation for Remand, the District Court had to find that there was damage to Kerr and a violation of Title I and that Petitioner is entitled to attorney's fees.

The Stipulation contains no such requirement, elements or admissions and the District Court considered the Stipulation on Remand upon the basis urged by the Guild and clearly set forth in the Order of Remand.

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The District Court in its original Memorandum of Decision stated as follows:

> "The Court finds that Plaintiff has failed to sustain his burden of proof that any violation of any right guaranteed by a union member by the law has occurred; that any action by Defendants, or either of them, was done maliciously or oppressively or as a result of any actionable conspiracy; that Plaintiff has suffered any damage or that the action taken by Plaintiff herein has resulted in any benefit to the Defendant union compensable by way of an award of litigation expenses or attorney's fees." [Cl. Tr. Vol. I, pp. 236, 242, and 247—74-2034].

The Findings of Fact and Conclusions of Law reflected the Memorandum of Decision and specifically at paragraph XII, the District Court found as follows:

"XII

> Plaintiff has not rendered any benefit to Defendants Screen Extras Guild, Inc., nor to the members of said Defendant labor organization by the action taken by Plaintiffs herein that is compensable by way of an award of litigation expenses or attorney's fees."

The guidelines as set forth by this Court in *Hall v. Cole*, are that attorney's fees under Title I of the Act are within the traditional and equitable powers of the Federal Court and the statute itself did not prohibit the granting of attorney's fees in a case where such fees are warranted. This Court set forth two separate criterias for the granting of attorney's fees in a Title I suit. One criteria is whether the Union's actions were based on malice or bad faith. The other

basis is where the litigation has conferred substantial benefits to a class of beneficiaries which would be the union membership.

It is clear from *Hall v. Cole* that a Plaintiff's attorney is not entitled to attorney's fees as a matter of right simply by bringing a lawsuit under Title I. The District Court, in order to grant attorney's fees, must find that the Plaintiff has prevailed on at least one of the two criterias set forth above, namely whether the actions of the Union were based on malice or bad faith, or secondly, where the litigation has conferred substantial benefits to the membership of the Union.

Since the District Court found against Kerr on both grounds and made specific Findings of Fact, after a trial that Kerr had not rendered any benefits to the Guild or to its members and that there was not any malice or bad faith, then Kerr was not granted any relief and did not prevail in the suit. On this basis Petitioner was not entitled to attorney's fees.

The District Court upon hearing evidence, made a specific finding following the trial: that Kerr would not prevail; that he had not suffered any damages; that there was no bad faith or malice, or that there were no benefits conferred on the membership of the Union.

It is clear that Kerr did not suffer any damages in this matter since the charge regarding his position on the Board of Directors was never challenged. The charges were filed and then dropped and never processed before a Trial Board.

Any benefits that might have been conferred on the membership by a prosecution of Title I rights

by virtue of Kerr's lawsuit, was established in 69-1954-HP (the First Disciplinary case), and the District Court, by an award of attorney's fees to Petitioner in the amount of $6,000.00.

The District Court upon denying attorney's fees and reaffirming its original opinion, found no reason to change its previous Findings of Fact and Judgment, in view of *Hall v. Cole.* The District Court stated that it was never the opinion of the District Court that attorney's fees were not allowable in a Title I action, even prior to *Hall v. Cole.* The District Court specifically pointed out that it was denying attorney's fees on the basis that Plaintiff has failed to prove his case and there was no Judgment entered against the Guild on the merits of a Title I violation.

Although Petitioner makes many assertions in his Petition, there is no doubt that the Findings of Fact are supported by evidence that establishes that Kerr did not incur any actual or imminent injury or any loss or damage because of the charges filed against him regarding his position on the Board of Directors of the Guild. He served his full term as a Board member without any interference from the Guild. The evidence establishes clearly that the removal charges were not held before any Trial Committee, or the Board of Directors or the Guild membership. It is difficult to understand how the District Court could find other than it did, in denying relief to Kerr. See *Baron v. North Jersey Newspaper Guild,* 342 F.2d 423 (C.A. 3d 1955); *Carroll v. Associated Musicians of Greater New York,* 360 N. 2d 574 (C.A. 2d 1963).

It is clear from the decision of this Court in *Hall v. Cole,* that in order for a plaintiff's attorney to

be entitled to attorney's fees under Title I, that there must be a finding by the Court that Title I has been violated and by virtue of such violation, there was either malice or bad faith or that a substantial benefit was conferred upon the membership of the Union. Kerr and Petitioner failed to prove either of the allegations and, therefore, failed to meet the test of *Hall v. Cole.*

The District Court, in reviewing the Petition for Attorney's Fees and upon reconsideration of its original Judgment, instructed Petitioner to file all prior cases and documents involving all the cases concerning Kerr and the Guild which were before the District Courts. In its denial of attorney's fees, the District Court, in addition to affirming its original decision, set forth that Petitioner had received substantial attorney's fees in the total sum of $26,000.00, in the other two cases, and that the Guild was not a union with a large membership or a substantial treasury and that the litigation had already cost the Guild a substantial amount of money. It is clear from *Hall v. Cole* that the approach of the District Court was proper. This Court particularly referred to the fact that the District Court should review the ability of the Union to pay as compared to the benefits conferred to the membership. There must be a proper balancing in order to award attorney's fees and to determine the amount of attorney's fees. The principle of *Hall v. Cole* is that although there may be a benefit to the membership, it does not serve the membership any useful function to penalize the Union by awarding substantial attorney's fees which comes out of the Union treasury and, therefore, injures the entire membership. It is a case of benefiting the Union membership,

on one hand, by virtue of bringing the Title I action and then punishing the membership by depleting the Union treasury by awarding substantial attorney's fees. It is clear that this Court intended that a District Court, in allowing attorney's fees under Title I, must review all the circumstances and to reach a balance between actual benefits to the membership and the financial costs to the Union. In this case, the District Court reviewed the financial records of the Guild and reviewed the total amount paid by the Guild on attorney's fees. The Guild paid $20,000.00, and is obligated for an additional $6,000.00, to Petitioner. The District Court made a correct determination that Petitioner had received adequate compensation concerning representation in the cases involving Kerr and the Guild.

Conclusion.

For the above-stated reason, Respondent requests that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEO GEFFNER, a member of
GEFFNER & SATZMAN,
A Professional Corporation,

By LEO GEFFNER,

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